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No. 89-13

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1988

OREGON PHYSICIANS' SERVICE,
an Oregon nonprofit corporation,

*Petitioner,*

v.

JOHN HAHN, VADE LIGGETT,
JOSEPH AIZAVA, V.G. LIVINGSTON,
HUGH FRASER, and HIDE AIZAWA,

*Respondents.*

On Petition For Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

# PETITIONER'S REPLY AND SUPPLEMENTAL BRIEF

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## PARTIES TO PROCEEDINGS

Petitioner Oregon Physicians' Service has already noted in its petition that it merged with Northwest Hospital Service (dba Blue Cross of Oregon), which became Blue Cross and Blue Shield of Oregon, a nonprofit health care service contractor under Oregon law. In addition to its involvement in the joint venture identified in the petition, Blue Cross and Blue Shield of Oregon is the sole member in two separate nonprofit membership corporations: Capitol Health Care, a health care service contractor and federally qualified health maintenance organization; and Columbia Health Service, a health care service contractor in the State of Washington. In turn, Capitol Health Care has a wholly owned subsidiary: Capitol Health Management, Inc., a stock corporation. In turn, Capitol Health Management, Inc. is a holding company for Health Maintenance Of Oregon, Inc., a health care service contractor and federally qualified health maintenance organization; and Preferred Health Northwest, Inc., a stock health care service contractor. Blue Cross and Blue Shield of Oregon also has two wholly owned subsidiaries: Oregon Pacific States Insurance Company, a stock corporation life and health insurer; and Total Plan Alternatives, Inc. (fka Oregon Coordinated Services, Inc.), a stock corporation third-party administrator.

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Pursuant to Supreme Court Rules 22.5 and 22.6, petitioner Oregon Physicians' Service ("OPS") submits this reply and supplemental brief in support of its petition for a writ of certiorari.

**I. By Ignoring Petitioner's Status as an "Insurer" and Allowing an "Inference" of Conspiracy Because Some Physicians Perform Services Like those Performed by Plaintiff-Respondent Podiatrists and Some Other Physicians are Members of Petitioner's Corporate Board, the Ninth Circuit Here Conflicts with Other Courts' Holdings That a Blue Shield Defendant is a Single Economic Entity and Insurer Not Constituting by its Nature a Conspiracy.**

To prevail on their Sherman Act Section 1 claims, respondents must first come forth with evidence to convince a reasonable fact finder that there was a conspiracy to restrain trade. Respondents do not contend that there was any direct evidence of a conspiracy, but instead argue that they could rely on an "inference" of conspiracy. Even assuming respondents' characterization of their "evidence" is correct,[1] it is not reasonable to "infer" that there was a conspiracy by the single defendant nonprofit Blue Shield corporation against respondents, and the Ninth Circuit ruling to the contrary here sets a dangerous precedent.

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[1] Petitioner OPS disagrees with much of respondents' characterization of the evidence of record, but for purposes of argument here, will assume the "evidence" is as cited to the record, or quoted from the Ninth Circuit opinions. In any event, the legal question here is what inferences can reasonably be drawn from such "evidence," which question should be and has been resolved as a matter of law by other courts, in conflict with the rationale and result reached by the Ninth Circuit here.

Throughout their brief, respondents rely upon what they characterize as the Ninth Circuit's rejection of "insurer" status for petitioner nonprofit health care contractor OPS. This rejection is a necessary predicate for a number of their contentions, including their argument regarding conspiracy: in order to evade authority that a corporation such as petitioner cannot conspire with itself, respondents attempt to side-step this issue by contending that petitioner is not an "insurer," but merely an "agent" of its member physicians. Not only does such rejection of petitioner's corporate "insurer" status and bald "inference" of conspiracy fly in the face of Oregon's statutory recognition and regulation of petitioner,[2] but it conflicts with numerous holdings from other circuits to the contrary.

Respondents here do not present any argument or evidence that petitioner operated in any way contrary to the Oregon statutes.[3] Instead, they argue, and the Ninth Circuit relied upon, a single case to "infer" a "walking conspiracy": *Va. Academy of Clinical Psy. v. Blue Shield of Va.*, 624 F.2d 476 (4th Cir. 1980). There, the court had

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2 Oregon explicitly acknowledged petitioner's status as a nonprofit health care service contractor corporation under ORS 750.005 (2)(a). (Petition No. 82-1773, Appendix B at 5 n.1; Appendix M at 103.) As a nonprofit health care service contractor, petitioner was regulated and supervised under the Oregon Insurance Code, which included a requirement that its policies generally be reviewed and approved by the Insurance Commissioner. ORS 750.055; 743.006, 743.009 (Appendix M at 105-109; Appendix K at 99-101).

3 In *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982), also cited by respondents and the Ninth Circuit, the two defendant plans were not "insurers," defined in that opinion as one who bears the risk of subscribers needing services. 457 U.S. at 339 n.7. Here, petitioner OPS is such an "insurer" (and ultimately, if the "risk withhold" is activated, OPS "members" would share in this risk).

before it two Blue Shield plans which it found had conspired with one another to implement a requirement that psychologists "bill through" a physician in order to be paid, contrary to Virginia law. 624 F.2d at 478-479, 481 ("the Plans had 'collaborated'"), 482 ("collective action of the Plans"), 483 ("defendants' policy"). Hence, there was no need to "infer" a conspiracy because there was direct evidence of an actual conspiracy: the court gratuitously "found" that those two Blue Shield defendants were "agents" of their physician members. 624 F.2d at 480-481.

Petitioner has already cited numerous cases in other circuits which have rejected such an "inference" of a "walking conspiracy". The Sixth Circuit recently followed a number of those cases in *Tennessean Truckstop, Inc. v. NTS, Inc.*, 875 F.2d 86, 90 (6th Cir. 1989), holding:

> "Blue Shield * * * existed for a legitimate purpose, namely the provision of medical insurance. * * *
>
> " * * * The fact that NTS--which bears the credit risk--expects to be paid by the end user does not make it a 'sham' organization, any more than the fact that Blue Shield is paid by its subscribers makes Blue Shield a 'sham' organization."

As noted recently in *Westchester Radiological v. Empire Blue Cross,* 707 F. Supp. 708, 711 n.6 (S.D.N.Y. 1989), for antitrust purposes the defendant Blue Cross and Blue Shield could be treated simply as a buyer of services where it pays the health care bill and seeks to set the amount to be paid (citing, inter alia, cases also cited in the petition here).

Respondents also attempt to bootstrap an "inference" of conspiracy from "evidence" that some physicians compete with them, and some other physicians

were on petitioner's corporate board. This, standing alone, simply cannot support an inference of conspiracy under decisions of this Court and other courts. The mere opportunity for potential competitors to meet does not amount to conspiracy: to hold otherwise, as does the Ninth Circuit here, is to condemn as a "walking conspiracy" any health care entity in which medical doctors participate. As another court has recently observed, "the mere opportunity to conspire among antitrust defendants is insufficient to permit the inference of conspiracy." *Sweeney v. Athens Regional Medical Center,* 705 F. Supp. 1556, 1565 (M.D. Ga. 1989), quoting *Bolt v. Halifax Hosp. Medical Center,* 851 F.2d 1273, 1286 (11th Cir. 1988) [opinion reinstated in part and remanded to panel for further consideration of a petition for rehearing, 874 F.2d 755 (11th Cir. 1989)(en banc)].

The Ninth Circuit's suggestion that such a mere possibility of conspiracy is sufficient here[4] is in direct conflict with not only this authority, but the other authority set forth in the petition. Further, in *Thompson v. Wise General Hosp.,* 707 F. Supp. 849, 852 (W.D. Va. 1989), the court held that an inanimate institutional

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[4] The Ninth Circuit's and respondents' citation to *Radiant Burners, Inc. v. Peoples Gas, Light & Coke Co.,* 364 U.S. 656 (1961) simply does not support their position. There, reviewing the grant of a motion to dismiss, the Supreme Court had before it ten members of a standards-setting association named as co-defendants, six of whom directly competed with plaintiff, with an allegation (that had to be assumed true) that those co-defendants actually "conspired" to completely eliminate plaintiff. Similarly, respondents' citation to a concurring opinion in *Associated Press v. United States,* 326 U.S. 1 (1945) is inapposite, not only because it is the sole opinion of one member of that Court, but because there, as the quote reflects, there were individual defendants demonstrably conspiring against direct competitors.

defendant cannot conspire by itself: some human individuals must be involved. In the absence of any specification of the who, when, how, and where, plaintiffs simply failed to demonstrate a conspiracy. *Id.*

The Ninth Circuit's failure to acknowledge petitioner OPS' status as a nonprofit health care service contractor corporation under the supervision of the Oregon Insurance Commissioner, and its failure to follow its sister circuits' holdings that a Blue Shield defendant in these circumstances is an independent economic actor, led to its erroneous acceptance of respondents' theory that notwithstanding the lack of any evidence of conspiracy, there was an "inference" that OPS is nothing more than an "agent" of its "member" physicians: in essence, a "sham". Under decisions of this Court and other courts, there has to be something more shown--some sort of "anticompetitive intent" or activity not present on this record--in order to support a finding of conspiracy.[5] Respondents have not identified a single

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[5] Respondents now argue that physicians could not compete with dentists, in an attempt to "distinguish" *Pa. Dental Ass'n v. Medical Serv. Ass'n of Pa.*, 745 F.2d 248 (3d Cir. 1984), upon which the District Court here explicitly relied. Petitioner OPS notes that by licensure, physicians could potentially "compete" with dentists, just as they could potentially compete with podiatrists such as respondents, because generally physicians are not prohibited by licensure from work on the oral cavity or the foot. For example, some physicians and dentists do reconstructive work involving the face and jaw: dentists specializing in this work are known as maxillofacial prosthodontists. *Murphy v. Aetna Life and Casualty,* 1988-2 CCH Trade Cases ¶ 68,240 (D. Or. 1986) (dentist brought antitrust claims challenging, inter alia, exclusion of dentists from definition of "physician"), affirmed without published opinion, 815 F.2d 714 (9th Cir.), dismissed for want of jurisdiction, __ U.S. __, 108 S. Ct. 447, 98 L. Ed. 2d 387 (1987), rehearing denied, __ U.S. __, 108 S. Ct. 1126, 99 L. Ed. 2d 286 (1988).

instance of "conspiracy," a single "co-conspirator," or any other "facts" necessary in order to make a prima facie case of conspiracy,[6] and accordingly the Ninth Circuit holdings here which approve an "inference" of conspiracy are contrary to decisions of a number of courts from other circuits. This Court should grant the petition to review this conflict.

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6 Respondents and the Ninth Circuit obliquely refer to "evidence" that "suggests" petitioner did not consider costs and overutilization as reasons for not inviting respondents to become members, citing deposition testimony of one of petitioner's board members. In that deposition, the board member merely stated that he did not recall whether such overutilization was considered and that costs might have been considered, and set forth very briefly his understanding of the historical evolution of Blue Shield plans. Respondents fail to acknowledge that the managers and employees responsible for preparing and presenting reports to the board specifically stated that they were concerned with costs and overutilization in connection with podiatrists' billing practices: in particular, podiatrists appeared to bill for a single surgery operation by billing under a number of different component procedures, thereby increasing the total bill. Affidavit of Suzanne Gilkey (September 26, 1983); Deposition of Suzanne Gilkey (July 2, 1986); Deposition of Roderick Bunnell (July 1, 1986). Furthermore, some specifically negotiated subscriber contracts-- including the subscriber contract for the Oregon Medical Association -- had coverage for 100 percent of all providers' billings (including nonmembers such as respondents). Deposition of Roderick Bunnell (July 1, 1986); Deposition of Marvin Urman (July 3, 1986). The fact that the medical doctors themselves specifically negotiated full payment for all providers, including respondents, hardly supports an inference that those medical doctors conspired against respondents. Likewise, the fact that petitioner at one point invited optometrists, not podiatrists, to membership, does not give rise to an "inference" of conspiracy. The Oregon legislature has never mandated "equality of insurance treatment" for podiatrists. (See Petition No. 82-1773, Appendix B at 23-24). However, the Oregon legislature did enact just such a statute for services of optometrists. ORS 750.065. (Appendix M at 109-110).

**II. Allowing Respondents to Proceed Is Contrary to This Court's and Other Courts' Holdings That In These Circumstances There Is No Unreasonable Restraint, and Health Care Providers Lack Antitrust Standing Because They Cannot Demonstrate Antitrust Injury.**

Respondents must also establish an unreasonable restraint of trade which resulted in injury to competition affecting interstate commerce.[7] Respondents now argue that there were two kinds of "injury," one from their own "balance billing" practices, and the other from a "shift" in consumer "preference." They provide no authority for either of their theories.

A recent Seventh Circuit decision stands in stark contrast with the result reached by the Ninth Circuit here. In *Schachar v. American Academy of Ophthalmology, Inc.*, 870 F.2d 391 (7th Cir. 1989), the court emphasized that defendant Academy did not attempt to coordinate its activities with any other

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[7] Contrary to respondents' statement in their brief, the issue of interstate commerce is one that might be appropriate for review by this Court. First, the issue is a legal one: the circuits have split on the test to apply, with the test applied by the Ninth Circuit in this case now specifically rejected by a number of other courts. Second, under the test applied by other courts, the district court here made an initial determination that there was no substantial link to interstate commerce: the previous Ninth Circuit panel had reversed because it determined the district court should have applied another standard. After applying that Ninth Circuit standard, the district court found that there was sufficient connection to interstate commerce to provide jurisdiction. Third, this is the appropriate time to raise this issue, because the Ninth Circuit standard was "law of the case" on this appeal. On this record, this Court could make a clear choice between the standards applied by other circuits and the initial district court decision here, or the Ninth Circuit one applied here.

independent actors (id. at 398), and that no restraint of trade was demonstrated where only competitors, not competition, may have been injured:

> " Antitrust law does not compel your competition to praise your production or sponsor your work.
>
> * * *
>
> "Animosity, even if rephrased as 'anticompetitive intent,' is not illegal without anticompetitive effect."870 F.2d at 399, 400 (citations omitted; emphasis added).

Respondents' complaint appears to be that under certain contracts between petitioner and its subscribers, subscribers would be reimbursed for respondents' services according to an indemnity schedule. As the Ninth Circuit acknowledged, this was "usually" at the 60th percentile. (Appendix A at 10; Appendix B at 30.) Under a 60th percentile schedule, subscribers would be reimbursed for bills paid to respondents up to the 60th percentile: if the respondents' bills were at a rate less than or equal to the 60th percentile, payment of those bills would be reimbursed in full and respondents might be paid an amount more than or equal to that paid by petitioner to 60 percent of its members! If respondents billed at a rate higher than 60 percent of petitioners' members, respondents had the option of seeking payment from a patient of whatever difference remained unreimbursed. If a subscriber of petitioner paid such a bill, it would be the subscriber who was out of pocket, not respondents: if the subscriber was not billed for (or did not pay) any such difference, then there was no extra charge, or "injury," to the consumer. In short, there is no unreasonable restraint of trade, and respondents cannot have standing to prosecute this case because there is no antitrust injury, either to themselves or to the consumer-subscribers. Respondents were free to deal

with subscribers of OPS, or any other consumer, and according to their own "evidence," did so.[8]

This lack of antitrust injury is illustrated by a number of recent decisions. For example, the Sixth Circuit in *Tennessean Truckstop* held that plaintiff there (like respondents here):

> "might have enjoyed more business than it now receives * * *. But this does not necessarily constitute an antitrust injury; the fact that a particular competitor in a particular market has lost profits does not inevitably mean that competition as a whole is lessened." 875 F.2d at 88.

Similarly, in *Key Enterprises of Delaware, Inc. v. Venice Hosp.*, 703 F. Supp. 1513, 1518-1519 (M.D. Fla. 1989), the court pointed out that plaintiff was not a consumer, and that although defendants' activities might have affected other health care providers, those activities did not injure the consumers, and therefore did not injure competition. The consumer was always free to choose among competitors.[9] *See Westchester Radiological,* 707 F. Supp. at 713 & n.11.

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8 Respondents champion "evidence" that they were responsible for 30 percent of the billings to Blue Cross, and hence were treating patients with other insurance coverage. In fact, respondents admit that petitioner covered no more than 16 percent of the Portland "market" which they themselves defined, and no more than 25 percent of the Portland "insured" market. That obviously left at least 75 percent of the market to respondents without having to deal with petitioner at all.

9 In *Key,* the court also held that there could not be any claim for "boycott" or refusal to deal, because defendants did in fact "deal" with plaintiff, albeit on defendants' own terms. 707 F. Supp. at 1519 n.7.

## CONCLUSION

Because the Ninth Circuit holdings here conflict with decisions of this Court and other courts on matters of fundamental concern to the application of the antitrust laws to health care entities throughout this Nation, this Court should accept review.

Respectfully submitted,

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